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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1988

JOHN BAKER and JEAN G. BAKER, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Article XV (2) of the Agreement in Implementation of Article III of the Torrijos-Carter Treaty of 1977 provides:

> 2. *United States citizen employees and dependents shall be exempt from any taxes, fees or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.*

In *O'Connor v. United States*, 479 U.S. 27 (1986), when only the exemption set out in the first sentence of Article XV (2)'s two sentences had been claimed and argued before the Court, this Court's interpretation was that "exempt from any taxes" means "exempt only from Panamanian taxes."

The questions presented are:

Whether or not *O'Connor* required or even allowed lower court dismissal, without trial on the merits, of petitioners' complaint claiming exemption from U.S. income taxes under the full provisions of Article XV (2)?

Whether or not this Court's interpretation of Article XV (2) in *O'Connor* is correct?

LIST OF PARTIES

The parties to the proceedings below were the petitioners John Baker and Jean G. Baker and the respondent the United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING CERTIORARI	6

I. Guidance is needed for lower courts with respect to circumstances under which an interpretation of a treaty provision by this Court must be treated as dispositive.

II. This Court's decision in *O'Connor* should be re-examined in light of evidence now available.

PETITIONERS' DIFFERENT CLAIM	10
THE PLAIN LANGUAGE OF ARTICLE XV (2)	12
THE COURT'S PROVINCE IN TREATY INTERPRETATION	15
THE COURSE OF CONDUCT OF THE PARTIES	17
THE NEGOTIATING HISTORY	20
THE TRIVIALIZATION OF THE PANAMANIAN UNDERSTANDING	22
ARTICLE XVI (2) — THE MODEL	24

Page

THE TAX REFORM ACT OF 1986 25

THE INTERNATIONAL CONTRACT 26

CONCLUSION 27

APPENDIX

Judgment and order of First Circuit 1a

Judgment of District Court 2a

Order of District Court 3a

Recommended Disposition of Magistrate 8a

December 7, 1982, Affidavit, Michael Kozak 17a

March 2, 1984, Affidavit,
Dr. Carlos Alfredo Lopez Guevara 20a

Extract from negotiating transcript,
remarks of Dr. Aristides Royo, declassified
and released May, 1986 ..... 22a

Partial transcript, July 1984 Board
Meeting, Panama Canal Commission 23a

October 2, 1986, Affidavit, Dr. Aristides Royo 29a

TABLE OF AUTHORITIES

Page

THE UNITED STATES CONSTITUTION . . . . . *passim*

TREATIES AND INTERNATIONAL AGREEMENTS

The Panama Canal Treaty of 1977, T.I.A.S. 10030 . . . . . *passim*

The Agreement in Implementation of Article III of the Panama Canal Treaty of 1977, T.I.A.S. 10031 . . *passim*

The Agreement in Implementation of Article IV of the Panama Canal Treaty of 1977, T.I.A.S. 10032 . . . 24

STATUTES

U.S.C. 26, sec. 894(a), United States Code 3

Sec. 1232a, The Tax Reform Act of 1986, P.L. 99-514, 100 Stat. 2005 25

CASES

Coplin v. United States, 6 Cl. Ct. 115 (1984), ... *passim*

rev'd, Coplin v. United States, 761 F.2d 688 (Fed. Cir. 1985), ... 5, 8, 22

aff'd, sub nom., O'Connor v. *United States* 479 U.S. 27 (1986) . . . . . *passim*

Great-West Life Assurance Co. v. *United States*, 678 F.2d 180 (Ct. Cl. 1982) 20

Page

Harris v. *United States*,
585 F. Supp. 862 (U.S. D.C. Ga. 1984) *16*

aff'd. Harris v. *United States*,
768 F.2d 1240 (11th Cir. 1985) 16

O'Connor v. *United States*,
479 U.S. 27 (1986) ..... *passim*

Rocca v. *Thompson*,
223 U.S. 317 (1911) 9

Strong v. *United States*,
513 F.2d 556 (1975)
cert. denied. 423 U.S. 1015 (1975) 8

Sumitomo Shoji America, Inc.
v. *Avagliano*, 457 U.S. 176 (1982) 20

The Amiable Isabella,
6 Wheat. 1, 71-73 (1821) 15, 16

TWA v. *Franklin Mint Corp.*,
466 U.S. 243 (1984) 15

United States v. *Klein*,
13 Wall. 128 (1872) 25

United States v. *Sioux Nations*,
448 U.S. 371 (1980) 25

MISCELLANEOUS

The "diplomatic note" 17, 18

Excerpt, transcript of Board Meeting,
July 1984, Panama Canal Commission .... 23a, *passim*

Page

RECORDS OF THE NEGOTIATIONS

The negotiating transcript 21

The extract of remarks of Dr. Aristides Royo, first declassified by the Government, May, 1986 . . . . . 9, 21, 22a

AFFIDAVITS AND STATEMENTS

Affidavit of Michael Kozak 17a

Affidavit of Dr. Carlos Alfredo Lopez Guevara 20a

Affidavit of Dr. Aristides Royo 29a

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

JOHN BAKER and JEAN G. BAKER, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners John Baker and Jean G. Baker respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceedings on January 18, 1989.

OPINIONS BELOW

The unpublished judgment and order of the United States Court of Appeals for the First Circuit is reprinted in the appendix hereto, p. 1a.

The judgment and order of the United States District Court for the District of Maine (Cyr, D.J.) have not been reported. They are reprinted in the appendix hereto, p. 2a and p. 3a.

The Recommended Disposition of the Magistrate (Keith) is reprinted in the appendix hereto, p. 8a.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. sec. 1346 (a) (1), petitioners brought this action in the U.S. District Court for the District of Maine on June 5, 1985. On March 2, 1988, the district court accepted the magistrate's recommended disposition and dismissed petitioners' action on the pleadings "for failure to present a claim upon which relief can be granted," in light of *O'Connor* v. *United States*, 479 U.S. 27 (1986).

On petitioners' appeal, the United States Court of Appeals for the First Circuit, on January 18, 1989, summarily entered judgment and opinion affirming the judgment of the district court "for the reasons stated" therein.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. sec. 1291.

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

THE UNITED STATES CONSTITUTION

ARTICLE 1, SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States...

ARTICLE 2, SECTION 1. The executive Power shall be vested in a President . . .

SECTION 2. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . .

ARTICLE 3, SECTION 1. The judicial Power of the United States shall be vested in the courts . . .

TREATIES AND INTERNATIONAL AGREEMENTS

The Panama Canal Treaty of 1977, T.I.A.S. 10030; Ex-

tract from Article III (9) therein:

> (T)he rights and legal status of United States Government Agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by [the Agreement] signed this date.

The Agreement in Implementation of Article III, T.I.A.S. 10031: Article XV therein:

TAXATION

1. By virtue of this Agreement, the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.

2. United States citizen employees and dependents shall be exempt from any taxes, fees or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

3. United States citizen employees and dependents shall be exempt from taxes, fees or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.

4. The Coordinating Committee may establish such regulations as may be appropriate for the implementation of this Article.

STATUTES

26 U.S.C. sec. 894 (a):

(a) Income exempt under treaty. Income of any kind, to the extent required by any treaty obligation of the United

States, shall not be included in gross income and shall be exempt from taxation under this subtitle.

STATEMENT OF THE CASE

Petitioners commenced this action on June 5, 1985, in the U.S. District Court for the District of Maine, seeking refunds of excess U.S. income taxes they had paid for the years 1979, 1980, 1981, and 1982, during which time John Baker was a U.S. citizen employee of the Panama Canal Commission in Panama. The income on which petitioners had paid taxes, and on which, in Amended Returns, they had claimed to be exempt from payment of taxes, consisted of both the income received by John Baker as a result of his work for the Commission and the income he and Mrs. Baker derived from sources outside the Republic of Panama.

Petitioners claimed exemption under the provisions of Article XV (2) of the Agreement in Implementation of Article III, T.I.A.S. 10031, of the Torrijos-Carter Panama Canal Treaty of 1977, T.I.A.S. 10030.[1]

Action was proceeding regularly towards trial when, on September 8, 1986, on motion of the Government but *over*

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[1]Refer to Article XV (2) and its two sentences representing two distinct income tax exemptions. Insofar as is known to petitioners, no other litigants have claimed to be exempt from U.S. income taxes under the provisions of the second sentence as well as the first, possibly because their primary incomes were their Commission salaries, with not enough income over and above to constitute a gross income requiring the payment of any U.S. income taxes. The reasons others may have had for not claiming the second sentence exemption are not relevant here. However, this distinction in claims is critical, for claiming the second sentence exemption supports an entirely consistent reading of the text, whereas failing to, invites a charge of inconsistency.

petitioners' objection, the district court stayed proceedings pending the outcome of *Coplin* v. *United States*, 761 F.2d 688 (1985), then before this Court on appeal from the Federal Circuit.

This Court's decision in *Coplin, supra*, was handed down on November 4, 1986, *sub nom.*, *O'Connor* v. *United States*, 479 U.S. 27 (1986) [hereinafter *O'Connor*]. The decision was against the taxpayers. Petitioners moved for lifting of the stay and for extension of discovery; the Government moved for summary judgment, citing only *O'Connor*. On June 23, 1987, the district court accepted the magistrate's recommended disposition and, treating the Government's motion for summary judgment as a motion for judgment on the pleadings, dismissed petitioners' action without trial on the merits, "for failure to state a claim upon which relief can be granted." The court held petitioners' action "controlled by the precedent set in *O'Connor*."

Petitioners appealed to the United States Court of Appeals for the First Circuit, contending that dismissal without trial on the merits was denial of due process of law. Petitioners demonstrated that *O'Connor* was not dispositive in their action because of their different claim and arguments; similarly, that *O'Connor*, limited as it was to the factual matters before the Court *in that case*, was therefore not dispositive in other cases where differing factual matters might be, and likely would be, presented. Specifically, petitioners demonstrated that some of the evidence before the Court in *O'Connor* had been misconstrued, and some apparently not considered at all, while there was new evidence which could be offered in a separate trial on the merits. Finally, petitioners demonstrated that the decision in *O'Connor* was incorrect, constitutionally and on its logic, as well as on the facts.

The First Circuit entered judgment and order on January 18, 1989, summarily affirming the judgment and order of the district court "for the reasons stated therein." The First Circuit addressed none of the several considerations raised by petitioners, announcing simply that this Court's decision in *O'Connor* foreclosed any further proceedings.

Petitioners submit that *stare decisis* is not applicable in their case, that denial of trial on the merits is a denial of due process, that this Court's decision in *O'Connor* is not correct, and that therefore this Court should grant certiorari and consider rejecting *O'Connor*.

REASONS FOR GRANTING CERTIORARI

It is known that ordinarily a petition for writ presents only the reasons why the appeal should be heard, reserving for later the bulk of the arguments connected with the appeal. In this instance, it is this Court's own decision in *O'Connor* which, as applied by lower courts, has resulted in denial of trial on the merits to which petitioners submit they are entitled. Therefore, at some cost to brevity, petitioners herein advance some of their arguments challenging that decision by this Court.

In its decision in *O'Connor*, when only the exemption set out in the first sentence of Article XV (2)'s two sentences had been claimed and argued before the Court, this Court's interpretation was that the first sentence's wording "exempt from any taxes" defines an exemption only from Panamanian taxes.

The Court's *stated* reasoning is that Article XV's Section 1 "establishes the context" for all of Article XV, and that Section 1's expressed limitation of the exemption "from payment in the Republic of Panama" carries over, by ellipsis, to Sections 2 and 3.

The Court's *real reason*, self-confessed, for coming up

with the "contextual case," is to negate the second sentence's exemption from U.S. taxes on income derived from sources outside Panama, an exemption so broad, in the Court's view, as to be "utterly implausible." By itself adding the ellipsis which those who would read Article XV literally must fail to find, the Court places itself squarely in a legislative role, when its proper constitutional role is judicial only. The advisability of a treaty concession that U.S. negotiators may have made, unless in conflict with the U.S. Constitution, is not a matter for the courts, even the Supreme Court.

Admittedly, the Court, in addition to describing the second sentence's exemption, if an exemption from U.S. taxes, as "implausible," indicates that it fails to find, in the factual matters before it in *O'Connor*, a foundation for exemption from any U.S. income taxes. Nevertheless, the Court's real reasoning extends beyond its constitutional province. Furthermore, that there is ample foundation for the provision of exemptions from both U.S. and Panamanian taxes under Article XV (2), as provided in its two sentences, and, on the contrary, no foundation for an exemption limited to Panamanian taxation, can be shown by consulting evidence not considered in *O'Connor*.

Here it should be noted that a great deal more is at stake in decision as to certiorari than a correct treaty interpretation for petitioners alone. Favorable IRS determination could even yet result for a substantial (3,000 in 1979) but dwindling (1,000 in 1989) number of U.S. citizen Commission employees — an endangered species, to become extinct on December 31, 1999. Beyond the immediate issue, however, and of much wider significance, allowing *O'Connor* to stand could have two quite damaging outcomes.

First, there is the possibility that the harsh and unfair proposition advanced by Government counsel in this ac-

tion, and followed by lower courts reluctant to appear to be taking issue with this Court, will become the general rule. But is every interpretation of a treaty provision by this Court "a decision as a matter of law"? Even if so, would it necessarily be dispositive by *stare decisis?* If some decisions — *O'Connor*, for example — go beyond the provision's four corners and are based in part on factual matters, are they dispositive by *stare decisis?* Can it be recognized that the factual matters do not constitute a finite body of evidence and that the evidence in different cases may be different? Should the case of the first litigant to get to trial and appeal be the vehicle for the burial of all others, entombing with them the true facts, even if that case is poorly presented, or lost because of defendant's failure to disclose the evidence? No pertinent decision of this Court exists.[2] Lower courts need the Court's guidance now.

Second, and even more important, leaving *O'Connor* standing approves a questionable manner of dealing with material so sensitive as the wording of an international agreement, not simply for this treaty but for all treaties, and certainly those treaties in which English is not the language of both parties. Especially where the wording involves a compromise furthering the likelihood of treaty ratification, absolute clarity is essential. This nation's reputation as a straightforward, straight-talking treaty party is threatened when it makes one-sided interpretations in conflict with the literal terms in its agreements. Reliance on unsignalled ellipses might be permissible in ordinary conversation. But there is no place for casuistry in treaty interpretation, when

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[2] *Strong* v. *United States*, 518 F. 2d 556 (Ct. Cl. 1975), *cert. denied*, 423 U.S. 1015 (1975), if cited by the Government, can be readily explained. One of its headnotes calls a treaty interpretation "a decision as a matter of law," but only to contrast it with an administrative agency's interpretation. Nothing suggests a *stare decisis* stature.

words used and words omitted have been cross-examined by intelligent negotiators on both sides. *Rocca v. Thompson*, 223 U.S. 317 (1911). What is stated must not be changed by even this Court's resourceful addition. Once a treaty goes into effect, its wording must stand until changed by joint action of the party-nations. Our President, in his inaugural address on January 20, 1989, stated, "America means what it says, in treaties, . . ." Does the *O'Connor* decision meet the standard?

The fact is that *O'Connor* had little chance of being decided correctly; it had gone to the Claims Court on cross-motions for summary judgment, as if no questions as to factual matters existed. But beginning almost immediately, and continuing until only days before oral argument in this Court in October 1986, efforts were made by both sides to bring factual matters to court attention. Part of the problem was the Government's slowness, and even failure, in releasing pertinent documents, despite all reasonable efforts of the taxpayers to obtain them. In any event, none of the following significant items were mentioned in the Court's decision. All are appended to this petition. Specifically, there are:

(1) the extract transcript of a Commission Board Meeting in July 1984 in which was evident the Panamanian understanding that an exemption from U.S. income taxes was "*probably in the Treaty . . . already*" [appendix, p. 23a, at 28a];

(2) the extract of Panamanian negotiator Royo's remarks during the negotiations, describing the motivations behind the question of taxation as political rather than economic [appendix, p. 22a];

(3) the Affidavit of Panamanian negotiator Dr. Guevara [appendix, p. 20a]; and

(4) the Affidavit of negotiator and subsequent (1979-1982) president of Panama, Dr. Royo [appendix, p. 29a].

These several items reveal that Article XV (2), as understood by the Panamanian negotiators, does in fact provide exemption from both U.S. and Panamanian income taxes rather than only from Panamanian income taxes. All of this evidence is now clearly before the Court, with this petition.

PETITIONERS' DIFFERENT CLAIM

Unlike the claim in *O'Connor*, petitioners' claim is for exemptions under both sentences of Article XV (2). In claiming the first exemption and disclaiming the second, the taxpayers in *O'Connor* were unable to assert a straightforward and consistent reading of the text, one not requiring examination beyond the words themselves. In failing to make the argument that unless there was evidence that both signatories intended something other than the literal meaning, only the literal meaning could be found, the taxpayers in *O'Connor* passed up the critically important procedural *and substantive* proposition that the burden of proof should shift to the Government.

It cannot be overemphasized that it is the Government who contests the literal meaning of Article XV (2). Yet counsel for the Government did not even propose the "contextual case" the Court itself found in *O'Connor*. Instead, the Government argued that construing Article XV (2)'s language according to its plain meaning would do violence to the intention of the signatories. [See *Coplin v. United States*, 6 Cl. Ct. 115 (1984), hereinafter *Coplin*, at p. 127.] The Government itself should meet the burden of proving that the intent on both the Panama side and the U.S. side was to provide exemption only from Panamanian taxes.

Judgment should be against the Government unless it meets that burden.

The *O'Connor* counsel evidently did not wish to extend its claim of U.S. tax exemption to non-Commission income. However, in asserting that Article XV (2)'s second sentence need not be read in isolation but might be understood to refer to income earned while working for the Commission but outside Panama, the *O'Connor* counsel erred in point of fact as well as tactically. The Court was correct in describing this extension of the first sentence's limitation as "unnatural." Yet the Court itself slipped when it posited an even more unnatural ellipsis, across separately numbered sections rather than between sentences within the same section, in order to limit all exemptions to Panamanian taxes only. All overlooked the fact that governing Article III (9) of the Treaty establishes that coverage is for U.S. employees working in Panama only [see p. 3]. Furthermore, why should the Treaty need to stipulate that Panama had no right to tax U.S. Commission employees on income derived from sources outside Panama if other than Commission income?

Whether or not lower courts might have recognized the different claim and different argument in petitioners' action, without rejecting the reasoning in *O'Connor*, and could have found for petitioners on that basis, was important when this action was before the lower courts. It is no longer a major consideration except as an argument for disestablishing the rule which lower courts appear to be making with respect to the total finality of this Court's treaty interpretations. It is important, at this point, that this Court, having itself evaluated *the factual matters in O'Connor*, and being the only Court which can re-examine its decision, reconsider its interpretation of Article XV (2) and, on evidence now available, reject its decision in *O'Connor*.

THE PLAIN LANGUAGE OF ARTICLE XV (2)

Because the meaning the Court attributes to Article XV (2) could so easily have been explicitly expressed, but was not explicitly expressed, and because the first place to look for any provision's meaning is in the words themselves, petitioners ask this Court to look again at Article XV's text.

Entitled "TAXATION," the text is:

1. By virtue of this Agreement, the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.

2. United States citizen employees and dependents shall be exempt from any taxes, fees or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

3. United States citizen employees and dependents shall be exempt from taxes, fees or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.

4. The Coordinating Committee may establish such regulations as may be appropriate for the implementation of this Article.

Microscopically, the text follows the format —: 1(A); 2(B) and 2(C); 3(D); and 4(E), where 1, 2, 3, and 4 are the different sections, and A, B and C, D, and E are the separate sentences therein.

Maintaining this structure and simplifying the wording for clarification results in the following readings:

1(A) The Commission and its contractors and subcon-

tractors, both U.S. and Panamanian, are exempt from all taxation by Panama, whether on income or property.

2(B) All U.S. citizen Commission employees and their dependents are exempt from any taxation, by the U.S. or Panama, on Commission income. 2(C) Similarly, all U.S. citizen Commission employees and their dependents are exempt from taxation, by the U.S. or Panama, on income derived from sources outside Panama.

3(D) All U.S. citizen Commission employees and their dependents are exempt from taxation, by the U.S. or Panama, on gifts or inheritance, as well as on personal property required in connection with their Commission employment.

4(E) The Coordinating Committee may establish appropriate implementing regulations.

Further reducing the structure for ease of discussion results in the following schematic:

TAXATION

(1) A.
(2) B. Similarly, C.
(3) D.

Obviously A is independent; it stands alone, clear and unambiguous, in a distinctly separate numbered section. No expression of a connection with following sections is stated or signalled. D likewise stands by itself in its own distinctly separate numbered section and contains no indication of any connection with preceding sections, nor is any connection required for clear interpretation.

B and C stand together in their own distinctly separate numbered section. No expression of a connection with preceding or following sections is indicated or required for clarity. The positioning of the word "similarly" between B

and C, and not at the beginning of section 2, between B and A, places B and C on a similar footing with each other, but does not place either of them on the same footing as A.

The Court's logic in interpreting Article XV may now be analyzed. To begin with, the Court rejects the proposition that the tax exemption expressed by 2(C) could extend to U.S. taxes. It then argues, in essence, "if not C, then not B." This logic is incomplete and proceeds from a false premise. Petitioners submit that the reading must be "B, therefore C," offering in support of B — exemption from taxes of both parties to the Treaty — that at least one of them, Panama, understood that to be the provision. By logical extension, the exemption in B must extend to C. Furthermore, why even include C if exemption from only Panamanian taxation were in question?

Provisions limiting exemptions to the taxes of only one of the nations could have been expressed with grade-school ease, had such provisions been agreed to by both nations.

Similarly, a narrower subject-title could have limited the exemption to "Panamanian Taxation." Only the general subject-title "Taxation" was used.

A general introductory sentence, stating that the exemptions in each of the separate sections were to be from Panamanian taxes only, might have been used, but was not.

THE ONLY LOGICAL CONCLUSION: the exemptions were from the taxes of both nations!

Its failure to stick with Article XV (2)'s literal terms — "exempt from any taxes" — led the Court to other problems in its *O'Connor* decision. The Court recognized that the "contextual case" it came up with, by adding or positing an ellipsis, required substantiation. It therefore addressed the following: what it considered to be the consistent conduct of the parties; what it perceived to be a lack of any challenge by Panama; what it called, loosely, "the

negotiating history''; and the Tax Reform Act of 1986 (in a footnote).

The Court discussed only minimally the most pertinent matter: the intent and expectations on the Panama side.

Each of these matters bears on the appropriateness of certiorari and on the final decision in petitioners' action. Discussions of each will follow herein.

THE COURT'S PROVINCE IN TREATY INTERPRETATION

The United States Constitution assigns no treaty-making role to the courts. It is fair to describe the court's role in interpreting treaties as limited to determining WHAT IS STATED, not WHAT SHOULD HAVE BEEN STATED.

The Court in *O'Connor* found Article XV (2)'s expressed extension of the tax exemption to income derived from sources outside Panama ''implausible'' if it included exemption from U.S. taxes, and so sought a way to read a limitation into the first sentence which would ''similarly'' apply to the second. The Court in *O'Connor* did see some reasonableness in Panama's insistence that if it were not to tax U.S. employees on Commission salaries, then the United States should not tax them either. The Court saw ''no conceivable reason'' why the Panamanians would demand that the United States also forgo taxing U.S. citizens on non-Commission income, and ''no imaginable reason'' why the United States would itself yield more than it was asking Panama to forgo. Petitioners submit that whether a given concession should be made is a political, not a judicial, province.

Particularly pertinent here are the words cited by Mr. Justice John Paul Stevens in dissenting in *Trans World Airlines, Inc., v. Franklin Mint Corp.*, 466 U.S. 243, 263 (1984), quoting Justice Story's words in *The Amiable*

Isabella, 6 Wheat. 1, 71-73 (1821):

> (I)n the first place, this Court does not possess any treaty-making power. That power belongs by the Constitution to another depart ment of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops — whatever may be the imperfections or difficulties which it leaves behind.

Also pertinent is the comment of Mr. Justice Oliver Wendell Holmes, Jr., when ninety-two years old, to Mr. Justice Stone, then sixty-one, as cited in *The Judicial Process*, quoting Charles P. Curtis in his *Lions under the Throne* (Boston: Houghton Mifflin Co., 1947), p. 281:

> Young man, about 75 years ago I learned that I was not God. And so, when the people . . . want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, "Goddamit, let 'em do it."

It is difficult for a plain-talking person to believe that the wording "exempt from any taxes" could possibly be construed to mean, in a contract between two nations, exempt from the taxes of only one. *Harris v. United States*, 585 F. Supp. 862, (U.S. D.C. Ga. 1984), *aff'd*, *Harris v. United States*, 768 F.2d 1240 (11th Cir. 1985). A contract clear on its face must stand as is. Should only one of the parties wish, after the fact, to depart from the contract's terms,

courts should leave that party with the bargain it made, and not support unilateral non-compliance. Of course, should both parties regret the terms, they can together make a new agreement. The Court cannot make the agreement for them.

COURSE OF CONDUCT

The Court in *O'Connor* based its determination in part on its perception that the party-nations had been consistent in interpreting Article XV (2) as exempting only from Panamanian taxes. In fact, there had been no real consistency on the U.S. side either in applying the treaty terms or in defending in actions seeking court-ordered refunds.

Furthermore, with the exception of the "diplomatic note," which had such imperfections that the Court simply side-stepped discussing it[3], the limited evidence on the Panama side was that Panama regarded Article XV (2) as creating exemptions from the income taxes of both nations.

It is true that from the date the treaty was allowed to enter into force, on October 1, 1979, U.S. authorities attempted generally to deny that Article XV (2) created exemption from U.S. income taxes. The Commission, controlled by the United States and called a U.S. agency even though four of its nine Board members were foreign nationals (a one-of-

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[3] The note was a transmission through the U.S. Ambassador to Panama from Panamanian Foreign Minister Cardoze (who had suggested in the July 1984 Commission Board meeting that a U.S. tax exemption was "probably in the Treaty . . . already" [appendix, p. 27a]). With the note were four boilerplate-American statements — along the lines of the Kozak Affidavit — of Panamanians purported to have been negotiators of Article XV (two had not been). The note inaccurately listed Aristides Royo as in agreement. (In his Affidavit, Dr. Royo states that he had not indicated such agreement and had, in fact, never had a conversation of any kind with Minister Cardoze [appendix, p. 30a].)

a-kind U.S. agency), was instructed by U.S. authorities to withhold U.S. income taxes from Commission salaries. Even so, the Commission omitted withholdings in some instances on employees' insistence. IRS offices around the country were also inconsistent.

There had been clear indications, almost as soon as the text of the proposed treaty was first released in September 1977, that U.S. authorities knew or sensed that the Government of Panama might not then agree, and perhaps would not ever agree, with the U.S. interpretation that the exemption was from Panamanian taxes only. For example, there was the colloquy between Senator Richard Stone and State Department Legal Advisor Herbert J. Hansell at Senate Foreign Affairs Committee hearings [see *Coplin*, p. 139], in which Senator Stone suggested that exemption from U.S. income taxes would certainly be claimed, and that extensive litigation might be avoided by early U.S. clarification with Panama. Mr. Hansell took the position that the U.S. would not have entered into negotiations with respect to the internal matter of U.S. taxation of its citizens. (He apparently had not read the transcripts.) Mr. Hansell did say, "We will find a way to avoid this."

At the time, still well before the date the treaty was to enter into force, a simple exchange of diplomatic notes, if agreed upon, could have clarified the provision one way or the other. Insofar as is known to petitioners, the United States undertook no clarification with Panama until the eve of oral argument in *Coplin* before the Federal Circuit in February 1985 [see footnote 3]. There seems to have been, from the start, overriding reluctance on the part of U.S. authorities to take the question to Panama for mutual resolution. The only fair conclusion: U.S. authorities knew, or at least feared, that Panama would not agree with the U.S. position.

Beginning in 1981, in litigation around the country, the

Government routinely defended on the grounds that the Agreement did not have treaty status. The Claims Court's decision in *Coplin* clearly decided this point against the Government. The Government also offered a December 7, 1982, Affidavit of State Department employee Michael Kozak [included in the appendix, p. 17a, not so much for what it might prove as for what it does not prove]. Mr. Kozak stated, in a misleading way, that he had been "a member of the negotiating team," and that outright exemption from U.S. income taxes had not been a subject of the negotiations. He had not been a principal negotiator and had not been present during the pertinent negotiating sessions. He obviously could not state first-hand what had been said and not said or what had been agreed upon.

The term "exemption" had not been used by the negotiators with respect to either nation's taxes. Furthermore, it was not true that, as Mr. Kozak stated, "The Department of State records of the negotiations, therefore, contain no material which supports a contention that, by virtue of the Panama Canal Treaty or the Agreements in Implementation thereof, United States citizens are exempt from United States taxation on their income earned from the Panama Canal Commission." A great deal of discussion had revolved around the Panamanian negotiators' continued strong assertions that their country, in gaining exclusive sovereignty at the Canal, should have taxation authority, and that the United States, in losing the right to exercise exclusive sovereignty at the Canal, should not tax, certainly not exclusively. And, on the U.S. side, a good deal of discussion had revolved around the U.S. negotiators' reluctance to depart from what they believed to be established precedents that U.S. Government employees were not taxed by foreign countries in which they worked.

Whereas the Kozak Affidavit had been offered consistently prior to *Coplin*, the Government abandoned, in

that proceeding, its contention that Kozak's statement could be relied on in divining the purpose of Article XV. [See *Coplin*, footnote 16, at pp. 131, 132.]

Further lack of consistency is revealed in the defiant refusal of Government counsel in *Coplin* to comply with the Claims Court's request that some evidence of Panama's intent and expectations be obtained [see *Coplin*, p. 147]. The fact is that on the U.S. side there had been consistency only in the stonewalling and in attempts to avoid granting the exemption. No consistency had been demonstrated by the United States in discussing the problem, or possible problem, with its co-signatory when discussion was eminently appropriate, and there had been no consistency in Government defenses in cases around the country.

As to the course of conduct on the Panama side, this Court simply failed to see or to give any weight to Panama's significant challenge to the unilateral U.S. interpretation. The Court in *O'Connor* stated that, "Panama, which had four of its own nationals on the Board of the Commission, did not object" (to the unilateral U.S. position). That they did officially object, and did suggest that exemption from U.S. income taxes had been provided in the Treaty, shows up clearly in the extract of remarks of Panamanian Board Members Cardoze and Ortega at a Board meeting on July 8, 1984 [appendix, p. 23a], when the issue of special compensation for U.S. citizens continuing employment at the Canal was under discussion.

THE NEGOTIATING HISTORY

It is agreed that no court should give literal effect to treaty language which does not reflect the intention of the signatories. *Sumitomo Shoji America, Inc.*, v. *Avagliano*, 457 U.S. 176, 180 (1982) and *Great-West Life Assurance Co.* v. *United States*, 678 F.2d 180, 230 Ct. Cl. 477, 481

(1982). However, no court has the authority to re-write a treaty in order to ascribe to it the meaning urged by only one of the contract's signatories.

The Court in *O'Connor* found "only a single (unhelpful) reference to United States income taxation" in "the" negotiating history. It does not specify what that reference was. All concerned will agree that the transcripts of the negotiations with respect to Article XV are unsatisfactory, at least insofar as released to date. Time and space limitations preclude printing the transcripts here. It seems reasonable at this point to ask the Court to refer to the impartial discussion of the transcripts offered in *Coplin* at pp. 128-135, as if incorporated in this petition. That part of the transcript first released by the Government in May 1986, containing the following remark by Dr. Aristides Royo, should also be considered at this juncture [appendix, p. 22a]:

> We should recognize that in talking about the income tax matter, it is not really an economic factor but a political one. We are all politicians, and therefore realize that for U.S. workers living in Panama to pay income tax to our government signifies recognition of the sovereignty of our government over the territory they live in.

Dr. Royo's remark, along with the other parts of the transcript, makes it even clearer that the views of the two sides differed not so much with respect to revenues as with respect to sovereignty and immunity. Regarding the U.S. negotiators' claim of a long-time precedent for U.S. Government employees not to be taxed by the foreign countries in which they worked, the Panamanian negotiators had the following answer:

> We could also indicate that we are asking you to authorize the payment of income tax by United States

> citizens to Panama for income that they derive from work that is carried out in a country that isn't their own and an operation which does not come from the United States Treasury.

In other words, Panama did not buy the notion that U.S. citizen Commission employees were, strictly speaking, U.S. Government employees.

There is no notation in the transcripts that negotiators for either side ever departed from their widely differing positions. Article XV was proffered by the U.S. delegation at the last negotiation session, in August 1977. The text was tabled without explanation and no objection was raised by the Panamanian delegation. "It was agreed" [see the Guevara Affidavit, appendix, p. 20a].

Petitioners submit that this Court, upon the deserved re-examination of *O'Connor* along with matters submitted herewith, will find much more than the "single (unhelpful) reference to United States income taxation."

THE TRIVIALIZATION OF THE PANAMANIAN POSITION

Petitioners offer with this petition copies of the affidavits of two of the principal Panamanian negotiators.

First there is the March 2, 1984, Affidavit of Dr. Carlos Alfredo Lopez Guevara [appendix, p. 20a], which was offered in *Coplin* and became part of that record. The Claims Court accepted it for the limited purpose of its account of what Dr. Guevara saw and heard, as one present when Article XV became part of the treaty package, essentially by compromise. [See *Coplin*, in footnote 16, pp. 131 and 132.] Dr. Guevara's Affidavit was not thereafter commented upon, either in the Federal Circuit's *Coplin* decision, or in *O'Connor*.

Second there is the October 2, 1986, Affidavit of Dr.

Aristides Royo [appendix, p. 29a], which was offered by taxpayers in *O'Connor* by way of a letter to the Clerk just prior to the October 14 oral argument before the Supreme Court, and only days before the Court's decision on November 4, 1986. Dr. Royo's Affidavit was of major significance. It confirmed the earlier Affidavit of Dr. Guevara. Like Dr. Guevara's Affidavit, it was a statement of Dr. Royo's recollection of what he and the Panamanian team were agreeing to for Panama, and of what the U.S. negotiators were agreeing to for the United States, in 1977, as he understood it at the time. Neither affidavit was an after-the-fact interpretation of Article XV's words. Both men were unequivocal in their understanding that the agreement was that U.S. citizen employees were to be exempt from both U.S. and Panamanian income taxes. And both had been present, participating, principal negotiators when Article XV, prepared and and proffered by the U.S. side without explanation, became the provision without comment or objection.

Either of the affidavits by itself deserved comment in the decisions of the courts. Together, these affidavits deserve to be accorded substantial weight. And Dr. Royo's Affidavit deserves particular weight inasmuch as he was president of the Republic of Panama from 1979 to 1982, during which time the United States should have informed the Government of Panama, but did not inform them, of the position with respect to exemption from U.S. taxes which the United States was following, and the questions raised with respect to that position. It becomes clear why no U.S. authorities discussed this difference with Panama until well after President Royo left office. Panama under President Royo would have insisted that the exemption was from both U.S. and Panamanian taxes.

The trivialization of these compelling affidavits is unexplainable. How can the Government continue to take the

position that construing the language of Article XV to provide exemption from both U.S. and Panamanian income taxes will violate the intent and expectations of the signatories? Petitioners submit that this Court's failure to note Dr. Royo's Affidavit and his position with the Government of Panama can mean only one thing — that its arrival at the Clerk's office so close to the date of argument and decision on November 4, 1986, prevented any consideration of it in *O'Connor*.

ARTICLE XVI (2) — THE MODEL

It has been noted that there are separate and distinct Agreements in Implementation of the Treaty's Article III (for Commission employees) and Article IV (for U.S. armed forces personnel in Panama).

Article XV (2) and Article XVI (2) of the respective agreements provide, under the same subject-title "Taxation," and in almost identical terms, exemptions "from any taxes, fees, or other charges." The notable difference is the inclusion, in XVI (2) only, of the phrase "as is provided by Panamanian law." Taxpayers in *Coplin* and in other actions have sought to make much of this difference in wording, while the Government has relied heavily on the Kozak Affidavit to head off the issue. Petitioners do not argue the point. The parallelism or lack of it in the wording of the two Articles is of little relevance. Each provision must stand or fall on its own, based on its own wording, taken together with evidence of the intent and expectations of both sides. Article XVI was agreed to two or more years earlier than Article XV, when at least some of the negotiators on the Panama side were different, and when many concessions of one kind or another were yet to be made by both sides. The wording of Article XV was one of the last matters to be agreed upon when the new U.S. Administration appeared

determined to have a treaty, whatever the cost. The United States did not make a good bargain, overall or in small particulars.

THE TAX REFORM ACT OF 1986

The Government may contend that The Tax Reform Act of 1986 "renders for naught" (the Government's words in its Reply Brief before the First Circuit) further litigation as to the meaning of Article XV (2). In a footnote in *O'Connor* this Court explains that its interpretation without reliance on The Tax Reform Act of 1986 enables it "to avoid confronting the constitutional questions posed by retroactive taxation."

Petitioners do not argue here that a retroactive provision necessarily renders legislation unconstitutional. Whether too much retroactivity is attempted here can be argued at some later time, if necessary. Meanwhile, there are other constitutional questions in this legislation looming larger than its retroactive application.

There is the question of the constitutionality of legislation which would attempt to withdraw from a court an action already commenced and ongoing at the time of the legislation's enactment. Congress exceeds its constitutional authority when it enacts legislation that has the effect of deciding a controversy still pending before a court of competent jurisdiction. *United States v. Klein*, 13 Wall. 128 (1872); *United States v. Sioux Nations*, 448 U.S. 371 (1980).

And there is, most importantly, the question as to whether or not Congress undertakes, unconstitutionally, a judicial role. The statute said to be applicable, Section 1232(a) of The Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, provides, in relevant part, ". . . no provision of the Panama Canal Treaty or its Implementation

Agreements *shall be construed* as exempting (in whole or in part) any citizen or resident of the United States from any tax under the Internal Revenue Code of 1954 or 1986." [Emphasis added.] Under the United States Constitution, construing legislation is the function of courts. Just as the Court may not make international agreements, the Congress may not construe its own legislation. Finally, if corrective action was needed, and apparently the Congress reasoned that it was, then only by joint action of both nations could a change have been made. The change cannot be made unilaterally by the United States.

THE INTERNATIONAL AGREEMENT

There is no better way to describe obligations under an international agreement, this contract, for example, than the words of Chief Judge Kozinski of the United States Claims Court in *Coplin*, at p. 142:

> Even if defendant [the United States] was under the impression that the provision only limits Panama's right to tax Commission employees, it must be remembered that it was the United States that proffered the language in question to Panama. Any ambiguity in the language must therefore be construed against the United States unless there is convincing evidence showing that both parties interpreted the provision in the same manner. Restatement (Second) of Contracts, sec. 206 (1979). As previously noted, no such evidence exists. Moreover, the United States appears to have had notice of the ambiguity at a very early stage in the process, long before the agreement went into effect. Its failure to alert its negotiating partner of the problem and to obtain a clarification means that the language should be construed as Panama would read it. The court's responsibility to act in good faith

toward nations that enter into treaties with the United States requires no less.

It is submitted that no fault can be found with that court's conclusion:

> The question presented in this case is not whether the Implementation Agreement (or indeed the Panama Canal Treaty package as a whole) is a wise policy; policy must be left to the political branches of our government. Nor is the question whether the agreement signed with Panama is a good deal for the United States; striking bargains with other nations is the prerogative of the President. The only issues presented here are whether the President was acting within the scope of his authority when he signed the Implementation Agreement and, if so, whether the agreement means what it says. For the reasons discussed above both questions must be answered in the affirmative.

CONCLUSION

For the foregoing reasons, it is requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1535

JOHN BAKER, ET AL.,
Plaintiffs, Appellants,

v.

UNITED STATES OF AMERICA,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Conrad K. Cyr, U.S. District Judge]

Bownes, Breyer and Torruella
Circuit Judges

John Baker and Jean G. Baker on brief pro se

Richard S. Cohen, United States Attorney, William S. Rose, Jr., Assistant Attorney General, Gary R. Allen, David English Carmack and David E. Brunori, Tax Division, Department of Justice, on brief for appellee.

January 18, 1989

Per CURIAM. The judgment of the district court is affirmed for the reasons stated in the district court's March 2, 1988 order accepting the magistrate's recommended decision.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BAKER and JEAN G. BAKER	)	
Plaintiffs	)	
vs.	)	CIVIL 85-0193-B
UNITED STATES OF AMERICA	)	
Defendant	)	

JUDGMENT

Pursuant to the 'Order Accepting Magistrate's Recommended Decision' entered by the Court in the above-entitled matter on March 2, 1988.

JUDGMENT is hereby entered for the defendant as against the plaintiffs and the complaint is hereby DISMISSED.

Dated at Bangor, Maine this 3rd day of March, 1988.

WILLIAM S. BROWNELL, CLERK

By: /s/ Gail B. Creath
Deputy-in-Charge

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BAKER and JEAN G. BAKER, Plaintiffs	.	
vs.	.	CIVIL 85-0193-B
UNITED STATES OF AMERICA, Defendant	.	

ORDER ACCEPTING MAGISTRATE'S RECOMMENDED DECISION

The plaintiffs claim a refund for income taxes paid for calendar years 1979 through 1982, and they object to the Magistrate's recommendation that the plaintiffs' motion to extend discovery be denied and the complaint be dismissed. The court undertakes *de novo* review of the Magistrate's recommendation that the complaint be dismissed. Fed. R. Civ. P. 72(b).

Plaintiffs contest the taxation of income which the plaintiff, John Baker, received from 1979 to 1982 as compensation for his employment by the Panama Canal Commission [the Commission] and from sources outside of Panama. Plaintiffs contend that Article XV, paragraph 2, of the Agreement in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, United States-Panama, T.I.A.S. No. 10031 [hereinafter cited as Implem-

entation Agreement], exempts from United States taxation the income they received during those years.

On October 27, 1986, the court stayed proceedings in this action pending the Supreme Court's decision in *Coplin v. United States*, 6 Cl. Ct. 115 (1984), *rev'd*, 761 F.2d. 688 (Fed. Cir. 1985), *aff'd sub nom., O'Connor v. United States*, 107 S.Ct. 347 (1986), which yielded a dispositive interpretation of Article XV of the Implementation Agreement. In *O'Connor*, the Supreme Court held that Article XV does not exempt the salaries of United States citizen employees of the Commission from taxation by the United States, but only by Panama. The plaintiffs now move for further time to develop a record which they assert would convince this court to reject *O'Connor*, notwithstanding the abysmal prospects of such eventuality in light of the dictates of *stare decisis*.

The plaintiffs first object to the Magistrate's treatment of the Government's so-called motion for summary judgment as a motion for judgment on the pleadings. The plaintiffs contend that the Government's motion for summary judgment must fail because it was not accompanied by a statement of material facts as required by Local Rule 19(b). The Magistrate correctly ruled that the Government's motion, however entitled, was a motion for failure to state a claim upon which relief can be granted, which, when asserted as a defense, may be treated as a motion for judgment on the pleadings. See Fed. R. Civ. P. 12(h)(2). Accordingly, the court accepts the allegations in the complaint as true and construes them in a light most favorable to the plaintiffs. *Carr v. Learner*, 547 F.2d 135, 137 (lst Cir. 1976); *Luce v. Hayden*, 598 F. Supp. 1101, 1102 (D. Me. 1984).

The complaint is straightforward. It alleges that,

during the period from 1979 to 1982, the plaintiffs received $147,574.80 as compensation for employment by the Commission and $76,375.00 from sources outside of Panama, all of which was exempt from United States taxation by virtue of the Implementation Agreement.

Article XV of the Implementation Agreement, entitled "Taxation", states as follows:

TAXATION

1. By virtue of this Agreement, the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.

2. United States citizen employees and dependents shall be exempt from any taxes, fees or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

3. United States citizen employees and dependents shall be exempt from taxes, fees or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.

4. The Coordinating Committee may establish such regulations as may be appropriate for the implementation of this Article.

In *O'Connor*, the Supreme Court was presented only with the issue of whether Commission salaries of the United States citizens were exempt from United States

taxation, and not whether income derived from sources outside of Panama was also exempt. Noting that "[t]he same issue is presented in numerous cases still pending in the lower courts," 107 S.Ct. at 350 (footnote omitted), the Court ruled adversely to the taxpayers with regard to Commission salaries. However, the Court's explanation of its interpretation of Article XV makes clear that income from sources outside of Panama, which is earned by Commission employees who are United States citizens, is subject to United States taxation:

> Unless one posits the ellipsis of failing to repeat, in each section, section 1's limitation to taxes "in the Republic of Panama," the Article takes on a meaning that is utterly implausible and has no foundation in the negotiations leading to the Agreement. For if the first sentence of section 2 refers to United States as well as Panamanian taxes, then the second sentence of section 2, and the totality of section 3, must do so as well — *with the consequence that United States citizen employees and their dependents would be exempt not only from United States income tax on their earnings from the Commission, but also from United States income tax on all income from sources outside Panama (e.g., United States bank accounts), and from all United States gift and inheritance taxes.* While, as the petitioners assert, there might have been some reason why Panama would insist that its inability to tax United States citizen Commission employees in Panama be matched by a detraction from the United States' sovereign right to tax those same earnings, there is no conceivable reason why this hypothetical "your-sovereignty-for-mine" negotiating strategy would escalate into a demand that the United States yield more sovereign prerogatives than it was asking Panama to

> forgo — and no imaginable reason why the United States would accept such an escalation, producing tax immunity of unprecedented scope.

107 S.Ct. at 350-351 (emphasis added).

The plaintiffs contend nonetheless that "the negotiating history of the Panama Canal Treaty demonstrates an intent to provide for a bilateral tax exemption for employees of the Commission," as evidenced by the record affidavit of Dr. Aristides Royo, a Panamanian negotiator of the Panama Canal Treaty, filed on October 17, 1986. On the record in this action, the plaintiffs contend that the Supreme Court decision in *O'Connor* was incorrect.

Even if the court were not firmly bound by *O'Connor*, it would remain clear that the Supreme Court did consider the negotiating history of the Panama Canal Treaty in rejecting the taxpayers' position. Commenting on the Court of Claims ruling in favor of the taxpayers, the Supreme Court observed:

> While the Claims Court may have been correct that the negotiating history does not favor the Government's position sufficiently to overcome what that court regarded as a plain textual meaning in favor of the taxpayers, it certainly does not favor the taxpayers' position sufficiently to affect our view of the text.

107 S.Ct. at 352. This action is controlled by the precedent set in *O'Connor*, and the complaint must be DISMISSED. The Magistrate's Recommended Disposition is ACCEPTED.

SO ORDERED.

Dated at Bangor, Maine this 2d day of March, 1988.

/s/ Conrad K. Cyr
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BAKER and JEAN G. BAKER	)	
Plaintiffs	)	
vs.	)	CIVIL 85-0193-B
UNITED STATES OF AMERICA	)	
Defendant	)	

RECOMMENDED DISPOSITION OF PLAINTIFFS' MOTION TO LIFT ORDER STAYING PROCEEDINGS AND TO EXTEND DISCOVERY DEADLINE AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On December 24, 1986, plaintiffs filed a motion to lift the stay of proceedings and to extend the discovery deadline. On January 2, 1987 the defendant filed an objection to the plaintiffs' motion to extend the discovery deadline. On that same date the defendant filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56. The defendant's motion is grounded on the assertion that, construing all the facts in the light most favorable to the plaintiffs, the United States is entitled to judgment as a matter of law. A hearing on the motions was held on April 13, 1987.

This action involves a claim for refund of taxes paid by the plaintiffs for the years 1979 through 1982. Plaintiff John Baker, a United States citizen, was an employee of

the Panama Canal Commission during those years. In each of those years the taxpayers' adjusted gross income included compensation received from the Commission. Income tax was paid on that income. This suit for refund is grounded on the claim that, because of Mr. Baker's status as a Commission Employee, income received from the Panama Canal Commission, as well as income earned from other sources, is exempt from taxation. The claimed exemption is grounded on the provisions of the Agreement in Implementation of Article III of the Panama Canal Treaty between the United States of America and the Republic of Panama.

Although the government filed a timely objection to the plaintiffs' motion to extend the discovery deadline, evidently through inadvertence a copy of the objection was not served on plaintiffs. Likewise, a copy of the motion for summary judgment was not served on plaintiffs when it was filed by the government on January 2, 1987. Plaintiffs assert that their motion should be granted because an objection was not served in accordance with Local Rule 19(c). In fact an objection was filed within the time limit prescribed by that Rule. The failure to serve a copy until later should not mandate that the court rule on the motion pursuant to Rule 19(c). Plaintiffs filed an objection to the motion for summary judgment on February 20, 1987. It appears that plaintiffs were not aware of the filing of the government's objection or the filing of its motion for summary judgment until Mr. Baker went to the Clerk's office on February 4, 1987 and learned of those filings. He then obtained copies from the United States Attorney's office. The government then formally made service by mail on February 26, 1987. Thus, it appears that the plaintiffs' objection to the motion for summary judgment should be considered as timely.

Plaintiffs assert that the motion for summary judgment should not be considered by the court because the government did not first file a motion to lift the stay of proceedings ordered by the court on October 27, 1987. The stay of proceedings was entered upon the motion of the government that all proceedings be stayed "until the Supreme Court renders its decision in *Coplin v. United States*, 54 U.S. Law Week, 3448 (Sup. Ct. Jan. 14, 1986)". The court's Memorandum and Order entered October 27, 1987, granted that motion and it would appear that the stay of proceedings was effective until the decision in the *Coplin* case was announced. The decision in *Coplin* and two companion cases was issued on November 4, 1986. 107 S.Ct. 347. Thus the stay of proceedings in this case terminated on that date. Even if the stay was interpreted in such manner as to require court action to lift it, the status of the stay now is that the plaintiffs have moved to lift it and the defendant has not objected. Thus, the motion to lift the stay could appropriately be allowed pursuant to Rule 19(c). Defendants take nothing from their argument that the motion for summary judgment should not be considered by the court.

In filing the motion for summary judgment the defendant did not, as required by Local Rule 19, annex to the motion a "separate, short and concise statement of the material facts, supported by appropriate record citations, as to which the moving party contends there is no genuine issue to be tried". However the defendant did file a memorandum, entitled Memorandum in Support of Motion for Summary Judgment, as required by Local Rule 19. In its memorandum the defendant posits as the only issue requiring determination the "issue of whether the relevant provisions of the Panama Canal treaty dealing with taxation of United States citizens, can be interpreted to exempt plaintiffs' income from United States' taxation". De-

fendant in its memorandum contends that "even if all of the facts which are set forth in the pleadings and gleaned through discovery proceedings are construed in a light most favorable to the plaintiffs," the decision in *O'Connor et ux v. United States*, 474 U.S.___, ____L.Ed.____,___S. Ct. ___ (1986) mandates that it must prevail as a matter of law." (107 S.Ct. 347). Defendant in effect is asserting the Rule 12(b)(6) defense of failure to state a claim upon which relief can be granted. This defense is not waived by failure to raise it in the responsive pleading or in a motion before the responsive pleading is served. Fed. R. Civ. P. 12(h)(2). It is open to the defendant to raise the 12(b)(6) defense at any stage of the proceedings by way of a motion for judgment on the pleadings. Although defendant has styled its motion as a motion for summary judgment, it is in effect a Rule 12(b)(6) defense and can be treated as a motion for judgment on the pleadings. A "summary judgment motion may be made on the basis of the pleadings alone, and if this is done it functionally is the same as a motion to dismiss for failure to state a claim or for judgment on the pleadings". 10 Wright, Miller and Kane, sec. 2713 at page 594.

Plaintiffs object and assert that discovery should be opened to enable them to develop a record which they assert would convince this court that *O'Connor* is wrong and that they are entitled to exemption from United States taxation. The plaintiffs' position in this litigation has been that the negotiating history of the Panama Canal Treaty demonstrates an intent to provide for a bilateral tax exemption for employees of the Commission. They assert that an exploration of the factual background of those negotiations by discovery would demonstrate that the conclusion reached in *O'Connor* was incorrect. They cite the October 2, 1986 affidavit of Aristides Royo as casting doubt on the conclusion reached by the court in

O'Connor. Mr. Royo was a chief negotiator of the Panama Canal Treaty and in his affidavit states that it was his opinion that the treaty "meant that neither of the two countries would assess taxes on the income of North American citizens for their work with the Panama Canal Commission". Plaintiffs argue that the court in *O'Connor* did not have the benefit of the affidavit in its deliberations. Plaintiffs in effect seek to have this court allow discovery to proceed and then after trial determine that the Panama Canal Treaty does in fact grant an exemption from United States taxation. However, that question of treaty interpretation was answered in *O'Connor*. The court did have before it the issue of the negotiating history of the Treaty. Its review of the history did not convince the court that an exemption from United States taxation was intended and it noted that:

> We find the petitioners' attempted reliance on other elements of the negotiating history unavailing. While the Claims Court may have been correct that the negotiating history does not favor the government's position sufficiently to overcome what that court regarded as a plain textual meaning in favor of the taxpayers, it certainly does not favor the taxpayers' position sufficiently to affect our view of the text. It contains, we may note, only a single (unhelpful) reference to United States income taxation — a silence that can perhaps be reconciled with the petitioners' position, but can hardly be said affirmatively to support it.
>
> *O'Connor v. United States*, __ U.S.__ , 107 S.Ct. 347, 352 (1986)

In *O'Connor* the court affirmed the decision of the Federal Circuit that Commission employees are not entitled to an exemption from United States taxation of their

salaries. Thus, for the purposes of this case the law on that point is settled and plaintiffs could not adduce facts under this complaint which would entitle them to recover judgment with respect to their income derived from Mr. Baker's employment by the Commission.

Plaintiffs, however, have also sought refund of the tax paid on income derived from sources outside the Republic of Panama. Although this precise issue was not determined in *O'Connor* it is not conceivable that the Treaty does not exempt Panamanian income from United States taxation but does exempt income derived from sources outside Panama.

Plaintiffs contend that the second sentence of section 2 of Article XV of the Implementation Agreement [1] grants such exemption from United States taxation.

1

Article III of the Treaty, entitled "Canal Operation and Management," specifies that "the rights and legal status of United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article . . ." Treaty, Article III, sec. 9. The latter agreement, signed simultaneously with the treaty, see the Panama Canal Treaty: Implementation of Article III, Sept. 7, 1977, T.I.A.S. No. 10031 (hereinafter Agreement), contains the provision that gives rise to the present dispute. Article XV of the Agreement, entitled "Taxation," provides as follows:

> 1. By virtue of this Agreement, the Commission, its contractors and sub-contractors are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.
>
> 2. United States citizen employees and dependents

However, the court in *O'Connor* has clearly expressed its view of that contention. The court found that the exemption "from payment *in the Republic of Panama* of all taxes" set forth in Article XV(1) established "the context for the discussion of tax exemptions in the entire Article — so that when Secs. 2 and 3 state that 'United States citizen employees . . . shall be exempt from taxes' they are understood to be dealing only with taxes payable in Panama." The court found "some purely textual evidence, albeit subtle, of the understanding that Article XV applies only to Panamanian taxes . . . " *O'Connor, supra*, at 350. The court then went on to say at pages 350-351:

> More persuasive than the textual evidence, and in our view overwhelmingly convincing, is the contextual case for limiting Article XV to Panamanian taxes. Unless one posits the ellipsis of failing to repeat, in each section, section 1's limitation to taxes "in the Republic of Panama," the Article takes on a meaning

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1 . con't:

> shall be exempt from any taxes, fees or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.
>
> 3. United States citizen employees and dependents shall be exempt from taxes, fees or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.
>
> 4. The Coordinating Committee may establish such regulations as may be appropriate for the implementation of this Article.

that is utterly implausible and has no foundation in the negotiations leading to the Agreement. For if the first sentence of section 2 refers to United States as well as Panamanian taxes, then the second sentence of section 2, and the totality of section 3 must do so as well -- with the consequence that United States citizen employees and their dependents would be exempt not only from United States income tax on their earnings from the Commission, but also from United States income tax on all income from sources outside Panama (e.g., United States bank accounts) and from all United States gift and inheritance taxes. While, as the petitioners assert, there might have been some reason why Panama would insist that its inability to tax United States citizen Commission employees upon their earnings in Panama be matched by a detraction from the United States' sovereign power to tax those same earnings, there is no conceivable reason why this hypothetical "your-sovereignty-for-mine" negotiating strategy would escalate into a demand that the United States yield more sovereign prerogatives than it was asking Panama to forgo — and no imaginable reason why the United States would accept such an escalation, producing tax immunity of unprecedented scope.

As the court in *O 'Connor* found no treaty exemption from United States taxation for Panamanian income, it inevitably follows that there can be no treaty exemption from United States taxation for income derived outside the Republic of Panama. There is no state of fact which plaintiffs could prove which would entitle them to judgment. They in effect seek to litigate the meaning of Article XV of the Implementation Agreement. However, that issue, with respect to the claimed tax exemption, is foreclosed by the decision in *O 'Connor*.

Accordingly, I recommend that:

1. Plaintiffs' Motion to Extend Discovery Deadline be denied.

2. Defendant's Motion for Summary Judgment be granted and the complaint be dismissed.

Notice

A party may file objections to those specified portions of this report or proposed findings or recommended decision for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten days after being served with a copy hereof. A responsive memorandum shall be filed within ten days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated at Bangor, Maine this 23rd day of June, 1987.

/s/ Edward H. Keith
Edward H. Keith
United States Magistrate

AFFIDAVIT OF MICHAEL G. KOZAK

(as offered in *Coplin*)

I, Michael G. Kozak, hereby affirm and attest that the following statements are true to the best of my knowledge and belief:

1. I am currently the Deputy Legal Adviser for the United States Department of State. I have held this position since September of 1982.

2. Since October of 1971, I have held various positions as an attorney within the State Department.

3. During the period September, 1973, through September, 1977, I was assigned as a member of the negotiating team for the State Department, and in that capacity participated directly in the negotiation of the Panama Canal Treaty and of the Agreements in Implementation thereof.

4. In my official capacity at that time, I was one of the principal drafters of the Treaty and of the Agreements in Implementation of Article III and IV thereof.

5. The Agreement in Implementation of Article IV was negotiated and agreed upon prior to the Agreement in Implementation of Article III.

6. The Agreement in Implementation of Article IV governs the rights and legal status of United States members and employees of the United States Armed Forces in Panama.

7. Article XVI of the Agreement in Implementation

of Article IV governs taxation of United States Armed Forces' members and employees and their dependents. A true and correct copy of Article XVI is attached hereto as Exhibit 1.

8. The operative language of Article XVI is derived from standard Status of Forces Agreements (hereinafter, SOFA) negotiated between the United States and foreign countries in which the United States Armed Forces members and employees are stationed.

9. One of the purposes of a SOFA is to ensure that United States citizen employees stationed in a foreign country are not subject to host-country taxation.

10. Article XV of the Agreement in Implementation of Article III of the Treaty governs, *inter alia*, taxation of United States employees of the Panama Canal Commission and their dependents. The operative language of Article XV was taken verbatim from that of Article XVI of the Agreement in Implementation of Article IV.

11. The purpose of the pertinent language of Articles XV (Article III Agreement), and XVI (Article IV Agreement) is identical to that of the relevant language of the SOFA upon which it was based — *i.e.*, to ensure that United States citizen employees of the Canal Commission or of the United States Armed Forces would not be subject to host-country taxation.

12. During the course of the negotiations, the Panamanian negotiating team raised the issue of the imposition by Panama of a tax on the income of U.S. citizens employed by the Panama Canal Commission.

13. The issue of an outright exemption of the income earned by these employees from United States taxation was never a subject of the negotiations, and was never considered as a subject for inclusion in the Treaty or its implementing agreements.

14. The Department of State records of the negotiations, therefore, contain no material which supports a contention that, by virtue of the Panama Canal Treaty or the Agreements in Implementation thereof, United States citizens are exempt from United States taxation on their income earned from the Panama Canal Commission.

I declare, under penalty of perjury, that the foregoing statements are true, to the best of my knowledge and belief.

Executed on December 7, 1982, in Washington, D.C.

/s/ Michael G. Kozak
Michael G. Kozak

AFFIDAVIT OF DR. CARLOS ALFREDO LOPEZ GUEVARA

I, CARLOS ALFREDO LOPEZ GUEVARA, Panamanian citizen, bearer of identity card 2-25-965, married, of age, swear that the following statements are made to the best of my knowledge and that they are executed under penalty of perjury.

1.- I am Panamanian citizen and presently a practitioner in the Republic of Panama.

2.- Since April 1971 until December 1978, I held the position of Ambassador Extraordinary and Plenipotentiary for Canal Treaty Negotiation. In that capacity I acted throughout the negotiating process until its conclusion. I worked in the negotiation, drafting and translation of the text of the Treaty and related agreements.

3.- The original position of Panama was to tax all employees of the Panama Canal Commission because their salaries are not paid by the U.S. Government but by users of the Panama Canal.

4.- The first approach of the American delegation was to obtain exemption from Panama taxes in favor of the U.S. citizens. It is known that since 1955, Panamanian citizens working with the Panama Canal Company have been paying income taxes to the Republic of Panama.

5.- During the last negotiation session held in Panama, in August of 1977, the U.S. Delegation proposed the text of what is now Section XV, paragraph 2 of the Agreement in Implementation of the Panama Canal Treaty of 1977, which reads thus:

"2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama."

This text was tabled without explanation and no objection was raised by the Panamanian Delegation. Therefore, it was agreed.

6.- The implementing agreement is an integral part of the treaty. The Panamanian people, by means of a plebiscite held in October 1977, approved the treaty, which includes the implementing agreements. I have no doubt that for the Republic of Panama it would constitute a material violation of the treaty that the United States would disregard the clear text of Section XV(2) above transcribed which exempts United States citizens of all taxes in regard to their salaries as workers of the Panama Canal Commission.

7.- THE QUESTION OF NOT TAXING UNITED STATES CITIZENS BY THE UNITED STATES NOR BY PANAMA IS NOT AN INTERNAL PROBLEM OF THE UNITED STATES OF AMERICA AND THEIR CITIZENS. THE WORDING OF THE ABOVE TRANSCRIBED AGREEMENT IS CRYSTAL CLEAR. IT COMPELS BOTH PANAMA AND THE UNITED STATES OF AMERICA NOT TO TAX UNITED STATES CITIZENS BY REASON OF THEIR WORK WITH THE PANAMA CANAL COMMISSION. THIS IS AN INTERNATIONAL UNDERTAKING THAT THE UNITED STATES OF AMERICA SOLEMNLY AGREED TO FULFILL WHEN THE INSTRU-

MENTS OF RATIFICATION WERE EXCHANGED IN PANAMA, IN JUNE, 1978. [Emphasis added.]

The agreement is part of the treaty. It is an international compact.

Panama, March 2nd, 1984

/s/

DR. CARLOS ALFREDO LOPEZ GUEVARA

EXCERPT - REMARKS OF DR. ROYO DURING ONE OF THE NEGOTIATING SESSIONS, SUMMER 1977

(as furnished to counsel for the O'Connors by the Solicitor General, Department of Justice, May 15, 1986)

. . .

ROYO:

We should recognize that in talking about the income tax matter, it is not really an economic factor but a political one. We are all politicians, and therefore realize that for U.S. workers living in Panama to pay income tax to our government signifies recognition of the sovereignty of our government over the territory they live in.

. . .

SECRET

DECLASSIFIED BY RICHARD R. WYROUGH,
ARA/CEN
5/15/86

EXCERPT FROM TRANSCRIPT OF PANAMA CANAL COMMISSION BOARD MEETING, JULY 1984, WITH RESPECT TO PROPOSED COST OF LIVING ALLOWANCE (COLA)

. . .

CHAIRMAN GIANELLI: Dr. Cardoze?

DR. CARDOZE: (through the interpreter) Mr. Chairman, the matter we discuss is so delicate, and it is such a grave matter that I too want to make use of this opportunity to say something because I think we must all make some reference to this matter. I would like to identify myself with the statements of the Vice President and the Chancellor which represents the feelings of the four Panamanian members of the Board of Directors, and I am sure that this is also the feelings of the entire population of the Republic of Panama.

The matter of the privileges that we discussed and the monetary compensation for the loss of those privileges by the U.S. employees of the Commission as of October 1984 is a matter that has a long history behind it. We here in the Panama Canal Commission cannot make an abstraction. The Panama Canal is the expression of the most important factor of the relations between our two countries. I think we will be making a very serious mistake, this Board of Directors--this Commission will be making a very serious mistake if the COLA is approved as I am sure the administration is recommending with much difficulty.

I personally would be very saddened, and I would feel terrible if this Commission — if this Board made that

decision. I think we would be making a serious mistake and going against the current of our times, and against the special relationship that--the special relationship between our two countries.

The COLA contradicts what is provided for in the Treaty. The article that refers to the compensation establishes clearly that there will be no discrimination in the matter of salary. It is pointed out that there might continue on with certain — the employees might continue on with certain privileges, but this is in a limited manner precisely so that these privileges — the privileges they had as of November 1979 would continue not with the purpose of increasing them.

The whole conception of the Treaty, the whole spirit that governs this relationship, which is a contract of transaction, is to diminish slowly those causes of conflict, those irritants in the relationship in this the most important work that joins our two countries.

I believe that the COLA does not have any justification legally. It is not justified by the Treaty. On the contrary, it goes against the grain of the Treaty itself, against the spirit of the Treaty. On the other hand, to grant such a compensation at the levels that are being expressed—

I want to make a parenthesis here. I didn't want to make any reference to the study made by the consultants because our position to the COLA is much more than the particular aspects of the study, but I am doing this because I read the study. I would probably have certain questions and certain comments with the consultant, but I didn't

want to do that because our position goes beyond the mere study of a COLA.

First there is the matter of the Treaty; then the matter of the austerity policy that we have been living through. We have suffered in the Commission because we know there has been a lessening of the traffic through the Canal, and we know that the administration is making super human efforts to maintain a balance between revenue and expenses and if after all this, after all this struggle and study and putting our imagination to the budget to see how we could adjust our expenses to meet — to be in balance with our income, and we have been told that we have to limit certain things, and even capital investments have been affected, and within this administration, Panamanian and U.S. people have been having doubts as to whether the efficiency of the Canal has been affected because of austerity measures.

How is it after all this we are going to tell people we are going to have to make this payment of between five and six million dollars which has not been provided for in the Treaty. So this also contradicts the austerity program.

In the third place, we have debated here, we have argued about the dual salary scale. That has been the object of great discussions between us that has taken up a lot of time, and it has taken up a lot of our discussion for many meetings, even though we know there were other matters that we had to address, and with great rejoicing, and triumph, we were able to eliminate that dual salary scale. We knew what that meant for the morale of the Panamanian relationship and the relationship between U.S. and Panamanian employees for a more cordial relationship. We managed to do that, and now this very Board of Directors, these very same persons, who barely nine

months ago voted, and you voted, you, the U.S. members voted to abolish that dual wage scale, and now whoever is going to vote in favor of this proposal are going to vote to completely go back — for all practical purposes to go backward.

With all respect, I say this Board would not only be remiss with regard to their duties with regard to the Treaty, but it would be very inconsistent with logic.

Finally, we would also be contradicting something that's even more transcendental than all of the above, which is the new relationship between our two countries, that special relationship. These Treaties are the product of 70 years of history. When those Treaties established that as of a certain date these privileges must be eliminated, it is because there is a lot of history behind it. It is not because we are against any individual U.S. citizen. Because in this country there is a lot of good feeling towards the United States and their employees, and nobody can accuse Panama of being a country that is anti-American.

But it is something very human in our relationship. Privileges between classes is something that is always hated by all people. It is not tolerated. It is not acceptable. Therefore, I am very concerned that this measure will affect that new relationship, that special relationship between our two countries that are so closely tied by so many things and that new relationship which is being reflected in this Board, which is the way it should be because we are united by many more things than the things that separate us.

So I do want to repeat that it would be very grave, and we would be making a very serious mistake if we vote

in favor of the proposal that the Administrator is making. I repeat, we would be going against what was agreed upon. We would be going against the austerity policy. We would be going against elimination of the dual salary scale and going against that special relationship that we are all interested in fostering, and from every perspective we have been trying to build up. To the U.S. citizens that are here, and are an interested party to this--we understand that they have an interest in this. We, and here I am talking in the name of all the Panamanian members of the Board, and that is the general feeling in Panama also, we appreciate and we understand the labor, the work that these American citizens are doing for the Panama Canal and we also realize that many of them are very necessary, and their skills are essential for the operation of the Canal. We do appreciate it.

But there are things that are more important than personal interest at a particular point in time. I cannot forget Kennedy's words when he took power in the early years of the 60's when he said to his people, to his U.S. people, do not think what — do not ask what your country can do for you but what you can do for your country. I think the U.S. negotiators were wise, and just as the Panamanian negotiators established that the privileges would be eliminated — why did they do that? Because they knew that would be an irritant in the relationship. Likewise, the American negotiators were very wise. They looked for a manner in which they could give a compensation to the U.S. employees, in fact much more than the COLA could give. THERE IS A CLAUSE THAT SAYS THE U.S. CITIZENS WILL NOT PAY TAXES FOR THE SALARIES THEY EARN FROM THE PANAMA CANAL COMMISSION.

So if you believe that it is necessary to grant an additional compensation, then let's not make a mistake. Let

us give them — let's give this additional compensation to all employees, or if you want to give a special compensation to the U.S. citizens who were here prior to October 1, 1979, and who are going to lose their privileges, then let us look for it in the U.S. Treasury, and PROBABLY IN THE TREATY IS ALREADY A BASIS FOR SUCH A BENEFIT.

. . .

CHAIRMAN GIANELLI: Other comments?

Well let me enquire, Minister Ortega. Would the Panamanian members be willing to make some sort of a motion on this subject, following, for example, some of the points made by Mr. Anderson yesterday? Do you have a motion that you would like to put forth before this Board that would reflect your views, your recommendations?

MINISTER ORTEGA: (through interpreter) It happens, Mr. Chairman, that in my interventions previously, *Dr. Cardoze had expressed the aspect related to the income tax matter that could be something that — could be an exemption for the U.S. citizen, and that undoubtedly this would be a form of--it would be a real economic compensation.*

[Emphasis added.]

AFFIDAVIT OF DR. ARISTIDES ROYO

(translated from the Spanish)

Otober 2, 1986

I, Aristides Royo, Panamanian citizen, bearer of personal identity card No. 8-102-547, married, of legal age, declare under oath that the following declarations are done according to my knowledge and understanding with the knowledge that these are done under oath.

1. That I was a negotiator of the Torrijos-Carter Treaties, which were signed on September 7, 1977.

2. That in my position as negotiator, I participated in the sessions where matters relating to fiscal taxation were discussed.

3. That the Panamanian postition, many times reiterated, was that United States citizen employees of the Canal pay taxes to the Republic of Panama.

4. That the proposal outlined in the preceding paragraph was denied in an emphatic manner by the North American delegation.

5. That confronted with such refusal, I proposed that Panama receive part of the taxes collected by the United States from their subject employees of the Panama Canal.

6. That the United States negotiators denied Panama the right to impose taxes on North American citizen employees of the Commission.

7. That for Panama it would constitute an offense to her sovereignty that foreign workers not pay taxes to our government and, on the contrary for reasons of nationality, they would pay taxes to another nation not considered now as owner of the interoceanic natural resource nor with the capacity to exercise jurisdiction as it did during the period that the 1903 treaty was in effect.

8. That as a result of the impasse produced, a formula was negotiated which expresses in a concrete manner that:

> United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similary, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

9. As we do not consder the Canal part of the Government of the United States nor shall it be part of the Panamanian Government until December 31, 1999, and that according to the Treaties, Panama as a Sovereign territory granted to the United States the right to manage, operate, and maintain the Canal, it appeared to us that the solution of not paying taxes to neither of the two countries would be the most equitable solution and because of this, it was accepted, submitted to a plebiscite in Panama, and ratified by the Senate of the United States.

10. That WHEN THE RESOLUTION KNOWN AS PARAGRAPH 2 OF ARTICLE XV WAS PRESENTED BY THE NORTH AMERICAN DELEGATION AND ACCEPTHED BY THE PANAMANIAN DELEGATION, I UNDERSTOOD VERY CLEARLY THAT IT MEANT THAT NEI-

THER OF THE TWO COUNTRIES WOULD ASSESS TAXES ON THE INCOME OF THE NORTH AMERICAN CITIZENS FOR THEIR WORK WITH THE PANAMA CANAL COMMISSION AND BECAUSE OF THIS THE TEXT OF THE PARAGRAPH 2 OF ARTICLE XV EXPRESSED IT IN EXPLICIT FORM.

11. At no time have I been consulted by Minister Fernando Cardoze with whom I have never had any conversation in my life regarding this or any other subject.

12. I was called by phone in Madrid when I resided there because of my duties as ambassador, by Mr. Michael Kozak, attorney for the Department of State of the United States, this call being made between January and February, 1985. He questioned me about the breadth and interpretation of paragraph 2 of Article XV, and I replied that the final version was clear and conclusive and that this version had been approved by both parties, expressing that neither of the two countries would levy taxes on the North American citizens because of their work with the Panama Canal Commission. I also added to Mr. Kozak that it was not under the control of neither the negotiators nor the Panamanian government that the United States could establish taxes in different forms on North American citizens who work abroad, but at the same time reminding him of the text of paragraph 2 of Article XV as it was approved.

/s/ Aristides Royo
Aristides Royo

[Emphasis added.]